

SAPKOTA (Migration) [2021] AATA 4343 (20 October 2021)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Dhirendra SAPKOTA
CASE NUMBER:	1903939
HOME AFFAIRS REFERENCE(S):	BCC2017/2327733
MEMBER:	Peter Emmerton
DATE:	20 October 2021
PLACE OF DECISION:	Adelaide
DECISION:	The Tribunal remits the application for a Regional Employer Nomination (Permanent) (Class RN) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 187 (Regional Sponsored Migration Scheme) visa: • Public Interest Criterion 4020 for the purposes of cl 187.213 of Schedule 2 to the Regulations • •

Statement made on 20 October 2021 at 1:24pm

CATCHWORDS

MIGRATION – Regional Employer Nomination (Permanent) (Class RN) – Subclass 187 – Direct Entry stream – Cook – bogus document – work reference is in fact genuine in both authorship and content – applicant meets PIC 4020 – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5, 65

Migration Regulations 1994, Schedule 2, cls 187.213, 187.234

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Regional Employer Nomination (Permanent) (Class RN) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant applied for the visa on 30 June 2017. At the time of application, Class RN contained one subclass: Subclass 187 (Regional Sponsored Migration Scheme).
3. The criteria for a Subclass 187 visa are set out in Part 187 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Applicants seeking to satisfy the primary criteria must meet the 'Common criteria', as well as the criteria of one of two alternative visa streams: Temporary Residence Transition stream, or Direct Entry stream.
4. In the present case, the applicant is seeking the visa in the Direct Entry stream, to work in the nominated position of Cook, ANZSCO 351411, Skill level 3.
5. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.187.213 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because his claims and supporting documentation in support of the employment experience component requirement in his sub class 187 visa application under 187.234, may have constituted adverse information under PIC 4020 (1).
6. The applicant appeared before the Tribunal on 20 October 2021 to give evidence and present arguments. The Tribunal also received oral evidence via telephone from Nepal, from Mr Santosh Poudel, the previous employer who provided the reference in question.
7. The hearing was conducted with the assistance of an interpreter fluent in the Nepalese and English languages.
8. The applicant was represented in relation to the review by his registered migration agent.
9. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

10. The issue in the present case is whether a false work reference was given, thus whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 187.213 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and

- the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
11. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

12. The term ‘information that is false or misleading in a material particular’ is defined in PIC 4020(5) and the term ‘bogus document’ is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of ‘information that is false or misleading in a material particular’ in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a ‘false or misleading’ statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
13. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
14. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
15. The delegate stated that the applicant had provided the Department with a letter which claimed to be written by Santosh Poudel, owner of Mama Restaurant and Bar located in Pulchowk, Narayangarh Chitwan, Nepal. This letter stated that Mr Sapkota had worked at Mama Restaurant and Bar from 10 September 2010 to 20 July 2013.
16. The Department conducted checks to ascertain the genuineness of this letter, and in turn, to determine whether Mr Sapkota was in fact employed by Mama Restaurant and Bar in the capacity and for the time period as claimed. The Department determined that the letter had not been issued by Mr Poudel and that Mr Sapkota had not been employed by Mama Restaurant and Bar as claimed. This appears to be on the basis of 1 unscheduled telephone conversation with Mr Paudel, when he was not in his office and didn’t have access to employment records and 1 unscheduled

telephone call with a staff member who unwittingly answered the call and had not ever worked with the visa applicant. Both calls had originated from the Australian High Commission in India. From this the delegate concluded that Mr Sapkota had provided a bogus document in relation to his employment history.

17. The Tribunal is in receipt of the following documents which were also provided to the delegate at the time of their decision. These resulted from a natural justice letter sent to the visa applicant, on 21 December 2018, providing Mr Sapkota 28 days to respond to the allegation that the Reference was a bogus document provided to the Department. The letter asked him to specify if he believed there are any compelling circumstances affecting the interests of Australia, or compassionate or compelling circumstances affecting the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen.

- Nepalese work reference
- statutory declaration signed by Mr Sapkota
- affidavit signed by Mr Poudel
- affidavit signed by Bikram, current employee at Mama Restaurant and Bar

18. All of these documents state that the work reference provided is both genuine and accurate. The delegate chose to place greater emphasis upon the information provided by the Australian High Commission in New Delhi which cast doubts on the veracity of the reference, following their enquiries with the owner of the restaurant, Mr Poudel and the recently employed, Mr Bikram at the referencing restaurant in Nepal. Both Mr Poudel and Mr Bikram stated that they had been somewhat surprised, uncomfortable and unable to accurately answer the embassy enquiries at the time of the call.

19. During the hearing the Tribunal tested the information provided by the visa applicant in his Statutory Declaration which had been previously provided to the delegate. The details of his answers correlated with the documents and the information provided by both his current employer and his previous employer in Nepal. The Tribunal has in its possession a brief statement from the Training Centre Nepal, dated 4 August 2010 asserting the completion of the final cooking course examination undertaken by the visa applicant. It also has copies of relevant Cooking qualifications gained in Australia.

20. In addition to these documents the Tribunal has been provided with a detailed statement from the visa applicant's current employer discussing the assessment of the visa applicant by both himself and the Executive Chef, in his restaurant. In this statement he explains that the visa applicant had been physically tested for his claimed skill level upon his application for the role he currently occupies. Both he and his Executive Chef conclude that it would not have been possible to fake the substantial skills claimed, had he not had the experience asserted, in the Nepalese restaurant as stated in his reference. The Tribunal places substantial weight upon these assertions.

21. It is not logical in the view of the Tribunal to provide an unnecessary false document, (the reference from the Nepalese employer), as the requirements of the visa were covered by the existence of other undisputed documents. The Tribunal interrogated the visa applicant in regards to relevant cooking associated matters and was satisfied by his knowledge and is of the view that he is the Cook he claims to be.

22. The Tribunal was provided with verbal evidence from Mr Paudel from his home in Nepal during the hearing. This was in addition to the written Reference, dated 20 July 2013 and his Affidavit dated 10 January 2019. He asserted that the reference was accurate, the visa applicant had been employed by his restaurant and he had written the Reference in question. He explained that he was unprepared for the call from the Australian Embassy. He was not in the restaurant and therefore didn't have any staff records available to him. He had expected a follow-up call as he was unable to recall accurately the details of the visa applicant's employment history due to the large number of staff and regular changes. This did not occur. He also claimed that the Australian official did not properly introduce themselves which added to his hesitancy.
23. The Tribunal requested an estimate of his annual staff turnover. He stated it was in excess of 50%. It also questioned him regarding the payment of wages in cash. Both he and the visa applicant separately explained to the Tribunal that with the absence of the electronic banking facilities available that we take for granted, cash payments are the norm. The Tribunal is also aware of the formal hierarchy that exists in Nepalese society and concludes that it is probable the visa applicant as 1 of Mr Paudel's cooks would be only minimally known to him.
24. The Tribunal accepts the call took place and finds it unlikely that an Australian official would not introduce themselves correctly. It also accepts that the official may have formed the conclusion that the reference document may not be as claimed. This may have been in part because of the communication mismatch as previously stated and the associated circumstances of the call. Some cultural differences such as people working for cash without work records or accurate taxation records are foreign to our accepted and structured societal norms but it is fair to say more common in the society in which the visa applicant and the Mr Paudel were immersed. The Tribunal is aware that Mr Paudel is not fluent in English and is not aware of the language used by the Australian High Commission in India, during the telephone conversation. It is alert to the fact that this may have potentially added to communication challenges.
25. The Tribunal notes that cultural norms would likely lead to the deflection of questions rather than providing a displeasing negative response or violating the accepted structured societal norms. The Tribunal appreciates that a non-executive level, new employee, (Mr Bikram), may very likely be evasive when faced with an unexpected telephone call from a foreign official, on a topic for which he was not responsible or has no knowledge. The Tribunal places little weight on this information or the subsequent negative conclusions, as asserted by the delegate.
26. The Tribunal notes that the delegate chose to give little weight to the documents provided by any parties when they were in conflict with views expressed by the Australian High Commission. Repeatedly stating that they placed more weight on the information provided by the Australian High Commission in New Delhi without providing any firm evidence in support of what lead them to that conclusion. Whilst the Tribunal places great store on the information provided by the High Commission and is without doubt that the events as they reported upon them are in their view accurate, it is not possible to corroborate some of the information directly. The circumstances surrounding the process of gathering that information may not have provided the environment in which all parties were on an equal footing. This may have resulted in varying interpretations of information, perceived threat and subsequent potential obfuscation.
27. The Tribunal has determined, having considered the cumulative evidence available to it, that the Work Reference in question, claimed to be a bogus document by the delegate, is in fact genuine in both authorship and content. This subsequently means

that the requirements in 187.234 have been satisfied, as the Tribunal has determined that a genuine work reference had been provided, in order to meet the employment experience component, which had been under question.

28. The Tribunal is satisfied that material that is false or misleading in a material particular as defined in PIC 4020(5) has not been provided in relation to the visa application or a visa held in the 12 months before the visa application was made.

29. Therefore, the applicant meets PIC 4020(1).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(1)?

30. PIC 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2AA).

31. There is no evidence before the Tribunal that the applicant and each member of the family unit have been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused.

32. Therefore, PIC 4020(2) is met.

Has the applicant satisfied the identity requirements?

33. PIC 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity. There is no evidence before the Tribunal that causes it to be dissatisfied as to the visa applicant's identity.

34. Therefore, the applicant meets PIC 4020(2A).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(2A)?

35. PIC 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA).

36. There is no evidence before the Tribunal that the applicant or any member of the family unit (as defined in reg.1.12) have been refused a visa in the relevant period because of a failure to satisfy PIC 4020(2A).

37. Therefore PIC 4020(2B) is met.

38. On the basis of the above, the applicant does satisfy PIC 4020 for the purposes of cl 187.213.

DECISION

39. The Tribunal remits the application for a Regional Employer Nomination (Permanent) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 187 - Regional Sponsored Migration Scheme visa:

- Public Interest Criterion 4020 for the purposes of cl 187.213 of Schedule 2 to the Regulations

Peter Emmerton
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen; justify the granting of the visa.
- (5) In this clause:
- information that is *false or misleading in a material particular* means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.